Supreme Court, U.S.
FILED

No. 03- 03-939 DEC 26 2003
OFFICE OF THE CLERK

In The
Supreme Court of the United States

VICTOR DIAZ, CHARLES ROUNTREE, ROY EDWARD CLINE, RICHARD WEBB HARRIS, MITCHELL PHEFFER, PHILLIPE RICHARD, CLAYTON HORSCHELL, SHANE BRENT RICHINS, ARTHUR BOETTGER, TIMOTHY NOBLE, ORDWAYNE P. CHAUVIN, and GUILLERMO CARRIZALES-CORTEZ,

Petitioners,

v.

MCDERMOTT INTERNATIONAL, INC., MCDERMOTT UNDERWATER SERVICES, INC., CCC FABRICACIONES Y CONSTRUCCIONES, S.A. DE C.V., and CORPORACION DE INDUSTRIAS CONSTRUCCIONES, S.A. DE C.V.,

Respondents.

On Petition For A Writ Of Certiorari To The Louisiana Court Of Appeal, Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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December 26, 2003

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QUESTION PRESENTED

In a state court action under the Jones Act, 46 U.S.C. App. § 688, are injured seamen entitled to a jury determination of the validity of purported releases?

STATEMENT REGARDING PARTIES

All parties to the proceeding in the court below are listed in the caption of the case.

Ron Rozmarynowski is a plaintiff in the trial court and was accordingly listed in the caption in the court below, but he was not a party to this appeal because he did not sign a release.

Additional parties were originally defendants in the trial court and were accordingly listed in the caption in the court below, but they were not parties to this appeal.

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully request this Court to grant their petition for a writ of certiorari to review the judgment of the Louisiana Court of Appeal for the Fourth Circuit.

OPINIONS BELOW

The opinion of the Louisiana Court of Appeal, Fourth Circuit, has not been reported. It is reprinted as Appendix A, *infra*, at App. 1.

The order of the Louisiana Supreme Court denying discretionary review has not been reported. It is reprinted as Appendix B, *infra*, at App. 3.

The order and opinion of the Civil District Court for the Parish of Orleans has not been reported. It is reprinted as Appendix C, *infra*, at App. 5.

The opinion of the Louisiana Court of Appeal, Fourth Circuit, in an earlier appeal has been reported as *Coto v. J. Ray McDermott, S.A.*, 772 So.2d 828 (La. App. 2000). It is reprinted as Appendix D, *infra*, at App. 7.

JURISDICTION

The Louisiana Court of Appeal, Fourth Circuit, entered judgment on April 22, 2003. The Louisiana Supreme Court denied a timely application for discretionary

review on September 26, 2003. This Court has jurisdiction under 28 U.S.C. § 1257(a). *See also infra* at 7 n.4.

RELEVANT STATUTORY PROVISIONS

The Jones Act, 46 U.S.C. App. § 688, provides in relevant part as follows:

> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply. . . .

STATEMENT OF THE CASE

Petitioners are twelve crew members of the Derrick Lay Barge 269 (DLB-269), which sank in the Bay of Campeche, off the coast of Mexico, during Hurricane Roxanne on October 15, 1995. Respondent McDermott Underwater Services, Inc. (referred to, together with respondent McDermott International, Inc., as "McDermott") employed the eleven petitioners who are U.S. citizens. Respondent Corporacion de Industrias Construcciones, S.A. de C.V. ("CIC") employed petitioner Guillermo Carrizales-Cortez, who is a Mexican citizen and a permanent resident of the United States. Respondent CCC Fabricaciones y Construcciones, S.A. de C.V. ("CCC") owned the DLB-269, which CCC and McDermott operated together as joint venturers.

Approximately 250 crewmen survived the sinking of the DLB-269 and waves of twenty-five to thirty-feet in which they struggled to stay alive. They were rescued in stages over the next two days. Within a week of the rescue, McDermott invited the twenty U.S. survivors and their families to a "Heroes Banquet" in New Orleans to celebrate their survival. Don Terry, the pr sident of McDermott Underwater Services, met the crew in New Orleans just twelve days after the disaster and suggested that they settle their claims. (Unbeknownst to petitioners, McDermott had prepared release documents and had organized videographers to film their signing.) Terry threatened the men that, if they did not settle, they would lose their overseas jobs. He discouraged them from hiring lawyers and suggested that the whole diving industry, including their brother divers, would suffer if they filed suit. Terry deceived the U.S. survivors in several respects, lying about the amounts of the settlements agreed to by crew members in a similar disaster; telling the crew that any claims they filed would be transferred to a Mexican court where there would be no recovery; and promising that actions would be taken to prevent future disasters if they settled.

When the U.S. survivors declined to settle for less than $500,000 each, Terry replied, "We are too far apart, ya'll just go party down" at the Heroes Banquet. Throughout the banquet and during the night, McDermott personnel encouraged them to drink and drink excessively. The men were also advised that they would receive $75,000

each to sign the releases.[1] There was no back and forth negotiation.

The U.S. survivors were instructed to meet the next morning to sign the releases. Many were still drunk. Some were still drinking the next morning. Six of the present petitioners (and four other crewmen who are not parties to the present action) nevertheless signed releases immediately, and the remaining U.S. petitioners signed releases in the ensuing days and weeks. None had a full understanding of their rights when they signed the release documents. Although all of the petitioners were suffering from post-traumatic stress disorder, and Terry recognized that they might have needed psychiatric counseling at the time, McDermott did nothing to determine whether the crew members had sufficiently recovered from the trauma to be mentally capable of settling their claims.

Guillermo Carrizales-Cortez, as a Mexican national, received less subtle treatment. On the same weekend that McDermott was orchestrating the U.S. releases, the Mexican crewmen were summoned to CCC's offices. They were told that they would need to sign a document to receive their accrued pay and were promised additional financial help once they signed. The crewmen were then individually escorted into a back room where – in the presence of two men armed with sub-machine guns – they were given the document to sign. They were not allowed to read the document, nor were they told that it was a

[1] A Louisiana trial court determined that the value of the claim of another U.S. survivor who had not signed a release was over $966,000 – more than twelve times the amount offered to petitioners. *See Nielsen v. Northbank Towing, Inc.*, 768 So.2d 145, 151 (La. App. 2000).

release of liability. After signing, they received the accrued pay that was owed to them and an additional 10,000 pesos (approximately $3,000). They were then escorted out the back door so that they could not communicate with fellow crew members. In signing the document, Mr. Carizales-Cortes did not intend to release either CCC or McDermott, but the document purports to release them both.

Sooner or later, petitioners all sought psychiatric help. One of the treating psychiatrists has testified that they were not psychologically fit to make such an important decision when they signed the releases, that they were suffering from post-traumatic stress disorder at the time (although they did not realize it), and that they had been victims of manipulation, coercion, sleep deprivation, and intoxication.

Petitioners filed the present action in a Louisiana state court under the Jones Act, 46 U.S.C. App. § 688, and the general maritime law. Petitioners asked for a jury trial on all issues. Meanwhile, other survivors have filed their own actions in various forums. The largest group, consisting of approximately 180 Mexican nationals, have filed claims in Texas against their employer, CCC. These cases are being tried before Texas juries in blocks of ten. In the only case to go to trial thus far, the jury found the releases to be invalid.[2]

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[2] Because the circumstances under which the releases were obtained differed according to the crewman's nationality (*cf. supra* at 4), the Texas jury's finding of invalidity is more significant for Mr. Carizales-Cortes than it is for the eleven U.S. petitioners. It is highly relevant for all twelve petitioners, however, that the jury – not the court – is

(Continued on following page)

Respondents in the present action asserted the affirmative defenses of compromise and release.[3] Despite petitioners' request for a jury trial, the trial court ruled that the validity of the releases would be tried to the bench. The trial court reasoned that the availability of a jury trial on this issue was a procedural matter on which state law applied, although the actual validity of the releases was admittedly governed by federal law. *See infra*, App. 5.

Petitioners sought review on this issue in the state court of appeal, which affirmed on the ground that "[t]he trial court properly exercised its discretion" under state procedural law. *See infra*, App. 1. The Louisiana

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deciding on the validity of the releases in the Texas actions. *See infra* at 5.

[3] Respondents originally moved for summary judgment based on the releases, and the trial court granted the motion. In an earlier appeal, the state court of appeal ruled that there were genuine issues of material fact with respect to the video release sessions of each seaman, the adequacy of the consideration, and the adequacy of advice and representation. This precluded the granting of summary judgment. *See Coto v. J. Ray McDermott, S.A.*, 772 So.2d 828 (La. App. 2000); *infra* App. D. This earlier appeal and others, did not involve the issue presented in this petition.

Supreme Court denied discretionary review. *See infra*, App. 3.[4]

REASONS FOR GRANTING THE PETITION

The court below ignored controlling decisions of this Court in holding that the trial judge may displace the jury to rule on the validity of petitioners' purported releases. In so doing, it treated petitioners less favorably on an important issue than the Texas courts have treated other seamen injured in the same incident. This Court should either review the decision below on the merits or summarily reverse it under long-standing precedents.

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[4] Although the trial court has not yet rendered a final judgment in this action, the judgment below is sufficiently "final" for purposes of 28 U.S.C. § 1257(a) to vest this Court with certiorari jurisdiction. This Court has long taken a pragmatic approach to construing § 1257(a). *See generally* R. STERN, E. GRESSMAN, S. SHAPIRO & K. GELLER, SUPREME COURT PRACTICE § 3.5, at 144-46 (8th ed. 2002) (collecting cases). Whether the judge or the jury determines the validity of the releases is a separable and collateral matter, distinct from the underlying merits of the case (*i.e.*, whether respondents are liable to petitioners and the extent of the damages). *See, e.g., id.* § 3.6.

This Court's decision in *American Dredging Co. v. Miller*, 510 U.S. 443 (1994), is closely analogous. In *Miller*, the Louisiana Supreme Court had ruled that the defendant could not rely on the doctrine of *forum non conveniens*. It accordingly reversed the trial court's grant of a *forum non conveniens* motion and remanded the case for trial. This Court granted certiorari to review the defendant's separable and collateral claim that under the doctrine of *forum non conveniens* it should not be required to face trial in Louisiana.

I. The decision below is in conflict with the governing decisions of this Court

The proper resolution of this case required nothing more than the application of a simple syllogism in which this Court has already addressed both of the premises supporting the conclusion. Unfortunately, the courts below chose to ignore this Court's teachings.

A. An injured worker is entitled to a jury trial on the validity of a release under the Federal Employers Liability Act as a matter of substantive law

In *Dice v. Akron, Canton & Youngstown R.R. Co.*, 342 U.S. 359 (1952), an injured railroad employee sought personal injury damages under the Federal Employers Liability Act ("FELA"), 45 U.S.C. §§ 51-60, in an Ohio court. The defendant claimed that it was protected by "a written document signed by [the plaintiff] purporting to release [the defendant]." 342 U.S. at 360. The jury implicitly found the release to be invalid and awarded damages to the plaintiff. The trial court, applying the state's local procedural rules, held that the validity of the release was a question for the court – not the jury – and entered judgment for the defendant notwithstanding the verdict. This Court reversed. It held "that the right to trial by jury is too substantial a part of the rights accorded by the Act to permit it to be classified as a mere 'local rule of procedure' for denial in the manner that Ohio has here used." 342 U.S. at 363. In other words, the injured worker was entitled to the *jury*'s determination of the validity of the release, notwithstanding the state's local procedural rule to the contrary.

Subsequent FELA cases have confirmed that an injured worker is entitled to a jury resolution of every issue of disputed fact. *See, e.g., Rogers v. Missouri Pacific R.R. Co.*, 352 U.S. 500 (1957).

B. The Jones Act incorporates the Federal Employers Liability Act, including judicial interpretations, by reference

The Jones Act provides that "all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply" in a seaman's personal injury action under the Act. 46 U.S.C. App. § 688(a). From the earliest days, this Court has recognized that the quoted language incorporates the Federal Employers Liability Act ("FELA"), 45 U.S.C. §§ 51-60, into the Jones Act by reference. In its first Jones Act case, the Court explained:

> The reference, as is readily understood, is to [FELA] and its amendments. This is a recognized mode of incorporating one statute or system of statutes into another, and serves to bring into the latter all that is fairly covered by the reference.

Panama R.R. Co. v. Johnson, 264 U.S. 375, 391-392 (1924). *See also, e.g., Baltimore Steamship Co. v. Phillips*, 274 U.S. 316, 324 (1927); *Engel v. Davenport*, 271 U.S. 33, 35-36 (1926). More recent examples of the continued recognition that the Jones Act incorporates FELA include *American Dredging Co. v. Miller*, 510 U.S. 443, 455-56 (1994), and *Miles v. Apex Marine Corp.*, 498 U.S. 19, 23-24 (1990).

Because Congress intended to apply FELA's rules in Jones Act cases, it logically follows that the judicial interpretations of FELA also apply to the Jones Act.[5] As JUSTICE SCALIA wrote for the Court in *American Dredging*, "the Jones Act adopts 'the entire judicially developed doctrine of liability' under [FELA]." 510 U.S. at 456

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[5] An exception to this general rule can be made in the rare case when a FELA rule is logically limited to the railroad context or logically inapplicable in the maritime context. In *Cox v. Roth*, 348 U.S. 207 (1955), for example, the Court noted that FELA does not explicitly provide for the survival of actions against deceased tortfeasors. Such a provision would have been logically unnecessary in the railroad context. The *Cox* Court nevertheless held that the death of the employer would not defeat a Jones Act claim. *Id.* at 208-09. *See also The Arizona v. Anelich*, 298 U.S. 110, 123-24 (1936) (holding that the FELA assumption-of-the-risk rule tied to the railroad-specific Federal Safety Appliance Act does not apply under the Jones Act); *Cortes v. Baltimore Insular Line*, 287 U.S. 367, 377 (1932) (holding that the administrator of a deceased seaman could bring a Jones Act action based on the master's failure to provide proper care even though a FELA employer was not subject to such a duty because the duty was recognized under the general maritime law).

The *Cox* exception to the general rule is irrelevant here. The validity of a release could arise in any personal injury action. Indeed, the issue has regularly arisen in both the Jones Act and FELA contexts. *See, e.g., Dice v. Akron, Canton & Youngstown R.R. Co.*, 342 U.S. 359 (1952) (FELA case); *Garrett v. Moore-McCormack Co.*, 317 U.S. 239 (1942) (Jones Act case). The FELA rule giving the injured worker a right to a jury trial on this question is neither logically limited to the railroad context nor logically inapplicable in the maritime context.

Moreover, in every Jones Act case in which this Court has declined to follow the FELA rule, the effect has been to give *greater* protection to the injured seaman. This is in keeping with the long-standing rule that seamen are "wards of the admiralty," *Harden v. Gordon*, 11 F. Cas. 480, 485 (C.C.D. Me. 1823) (No. 6047) (Story, J.), and thus deserving of special protection. *See, e.g., U.S. Bulk Carriers, Inc. v. Arguelles*, 400 U.S. 351, 355 (1971); *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 247 (1942); *Robertson v. Baldwin*, 165 U.S. 275, 287 (1897).

(quoting *Kernan v. American Dredging Co.*, 355 U.S. 426, 439 (1958)). In *Miles*, JUSTICE O'CONNOR similarly explained that when Congress "incorporat[ed] FELA unaltered into the Jones Act" the judicial "gloss" on FELA was intended to be part of the package. 498 U.S. at 32.

There are many examples of this Court's applying an established interpretation of FELA when construing the Jones Act. Most recently, the *American Dredging* Court "th[ought] it evident that the rule which *Mayfield* announced for the FELA [regarding *forum non conveniens*] applies as well to the Jones Act." 510 U.S. at 456 (citing *Missouri ex rel. Southern R. Co. v. Mayfield*, 340 U.S. 1, 5 (1950)). "The decisive question in" *Kernan v. American Dredging Co.*, 355 U.S. 426 (1958), was "whether the principles developed in [a] line of FELA cases" would be extended to the Jones Act or limited to the FELA context. 355 U.S. at 436. The *Kernan* Court held that the FELA principles should be extended to the Jones Act, notwithstanding a strong dissent arguing that the relevant FELA principles were logically limited to the railroad context. And in *Hopson v. Texaco*, 383 U.S. 262, 264 (1966) (per curiam), the Court confirmed that the broad definition of "agents" announced in *Sinkler v. Missouri Pacific R.R. Co.*, 356 U.S. 326, 331-332 (1958), a FELA case, also applied under the Jones Act.

It is particularly appropriate for the *Dice* rule to apply under the Jones Act, for the *Dice* Court explicitly relied on the leading Jones Act case governing the validity of releases to reach its conclusion that federal law governed. *See Dice*, 342 U.S. at 361 (citing *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 244 (1942)). The *Dice* Court itself saw that the same rule applies in the Jones Act and FELA contexts.

C. It necessarily follows that an injured seaman is entitled to a jury trial on the validity of a release under the Jones Act as a matter of substantive law

By incorporating FELA and its judicial interpretations, the Jones Act adopts the *Dice* rule granting an injured worker the right to have a jury determine the validity of a purported release. Thus an injured seaman is entitled to a jury trial on the validity of a release under the Jones Act as a matter of substantive law.

II. The decision below is in conflict with the decisions of the Texas courts with respect to other seaman injured in the same incident

It is well-recognized that this Court regularly exercises its certiorari jurisdiction, particularly in statutory cases, in order to resolve conflicts in interpretation. The goal is to ensure that similarly situated parties are treated in the same way, regardless of where their cases are heard.

The need for this Court's intervention here is not based solely on an abstract concern that similarly situated parties might be treated differently as the result of conflicting precedents. A much more concrete disparity has already arisen. Different crewmen on the DLB-269 who were injured in precisely the same incident are already being treated differently depending on which court is hearing their cases. While Texas juries are determining the validity of the releases for the largest group of DLB-269 survivors, *see supra* at 5, the Louisiana courts have denied petitioners their right to a jury trial on the same issue.

In *Gondeck v. Pan American World Airways, Inc.*, 382 U.S. 25 (1965) (per curiam), this Court demonstrated the extraordinary steps it was willing to take to ensure that two groups of maritime workers injured in the same incident would not be subject to different legal results depending on the court that decided the case. *See id.* at 27 (justifying summary reversal on a second petition for rehearing in part because "[s]ubsequent to our orders in the present case, the Court of Appeals for the Fourth Circuit upheld an award to the survivors of another employee killed in the same accident.") No such extraordinary measures are required here, but the Court should be motivated by the same desire to ensure that similarly situated parties are treated in the same way, regardless of where their cases are heard. Petitioners should have the same jury trial rights as their injured shipmates who have sued in Texas.

III. The availability of a jury trial is an important issue under the Jones Act

The central importance of the right to a jury trial under the Jones Act is underscored by the statutory language, which grants an injured seaman an action for damages "with the right of trial by jury." 46 U.S.C. App. § 688(a).

This Court has often recognized the importance of this issue, having repeatedly held that factual questions under the Jones Act are to be determined by the jury.[6] *See, e.g.*,

[6] This Court has, of course, recognized that "'summary judgment or a directed verdict is mandated where the facts and the law will

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Chandris, Inc. v. Latsis, 515 U.S. 347, 369 (1995); *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81, 92 (1991); *McDermott International, Inc. v. Wilander*, 498 U.S. 337, 355-56 (1991); *Fitzgerald v. United States Lines*, 374 U.S. 16, 21 (1963); *Senko v. LaCrosse Dredging Corp.*, 352 U.S. 370, 374 (1957).

Indeed, the ability of an injured seaman to have a case heard by a jury is such a central feature of the Jones Act that this Court has summarily reversed lower court decisions denying injured seamen this right. *See also infra* at 15 n.7.

IV. If this Court prefers not to devote any oral argument time to this issue, it should summarily reverse the decision below

Because this Court has clearly established that injured seamen are entitled to a jury trial on the validity of their purported releases, it may be unnecessary to devote further oral argument time to this issue. This case would be an appropriate candidate for summary reversal.

Petitioners recognize that summary reversal is an extraordinary remedy that this Court generally uses only a few times each Term. But petitioners have demonstrated

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reasonably support only one conclusion.'" *Harbor Tug & Barge Co. v. Papai*, 520 U.S. 548, 554 (1997) (quoting *McDermott International, Inc. v. Wilander*, 498 U.S. 337, 356 (1991)). In this case, however, the state courts have already held that there are genuine issues of material fact on the validity of the releases that preclude summary judgment. *See Coto v. J. Ray McDermott, S.A.*, 772 So.2d 828 (La. App. 2000); *infra* App. D. The sole basis under federal law for removing this issue from the jury simply does not apply.

their clear entitlement under this Court's precedents to a jury trial here.

Moreover, this Court has a long history of summarily reversing lower court decisions denying the benefits of the Jones Act to injured seamen. *See, e.g., Hopson v. Texaco, Inc.*, 383 U.S. 262 (1966) (per curiam); *Tipton v. Socony Mobil Oil Co., Inc.*, 375 U.S. 34 (1963) (per curiam). Summary reversals have been particularly common when this Court has perceived that a lower court was denying an injured seaman access to a jury's determination of a disputed factual issue. *See, e.g., Butler v. Whiteman*, 356 U.S. 271 (1958) (per curiam); *Gianfala v. Texas Co.*, 350 U.S. 879 (1955) (per curiam).[7]

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[7] FELA, which Congress incorporated into the Jones Act by reference, *see supra* at 9, also has a long history of summary reversals, particularly on issues implicating the right to a jury trial. *See, e.g., St. Louis Southwestern Ry. Co. v. Dickerson*, 470 U.S. 409 (1985) (per curiam) (protecting the right to have the jury decide an issue); *Davis v. Baltimore & Ohio R.R. Co.*, 379 U.S. 671 (1965) (per curiam) ("the Court of Appeals improperly invaded the function and province of the jury"); *Dennis v. Denver & Rio Grande Western R.R. Co.*, 375 U.S. 208 (1963) (per curiam) ("[the appellate court] could not properly substitute its judgment for that of the jury"); *Harrison v. Missouri Pacific R.R. Co.*, 372 U.S. 248 (1963) (per curiam) ("We think that the Illinois courts improperly invaded the function and province of the jury in this case.").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

NO. 2003-C-0327

COURT OF APPEAL, FOURTH CIRCUIT

STATE OF LOUISIANA

VICTOR DIAZ, ET AL.

VERSUS

J. RAY MCDERMOTT S.A., ET AL.

IN RE:	VICTOR DIAZ, ET AL.
APPLYING FOR:	SUPERVISORY WRIT
DIRECTED TO:	HONORABLE GERALD P. FEDOROFF, JUDGE CIVIL DISTRICT COURT, ORLEANS PARISH DIVISION "E", 95-16491

WRIT DENIED

The trial court properly exercised its discretion in setting defendants' exceptions of res judicate for separate, bench trial. See La. C.C.P. art. 929.

New Orleans, Louisiana this 22nd day of April, 2003.

/s/ DRB
JUDGE DENNIS R. BAGNERIS SR.

/s/ Armstrong, J., Dissents
JUDGE JOAN BERNARD ARMSTRONG

/s/ EAL
JUDGE EDWIN A. LOMBARD

ARMSTRONG, J., DISSENTS.

I respectfully dissent. The right to a trial by jury as to the validity of a seaman's release is "part and parcel" of the remedy afforded the seaman under federal maritime law. *Dice v. Akron, Canton & Youngstown R. Co.*, 342 U.S. 359 (1952). Therefore, state court rules, which would deny a jury trial so as to the validity of a seaman's release, are superceded by federal law. *Id. See also Neely v. Hollywood Marine, Inc.*, 530 So. 2d 1116, 1123 (La. 1988).

APPENDIX B

The Supreme Court of the State of Louisiana

VICTOR DIAZ, ET AL. NO. 2003-CC-1409

VS.

J. RAY MCDERMOTT S.A., ET AL.

IN RE: Diaz, Victor etal; Rountree, Charles; Cline, Roy Edward; Harris, Richard Webb; Pheffer, Mitchell; Richard, Phillipe; Horschell, Clayton; Richins, Shane Brent; Boettger, Arthur; Noble, Timothy; Chauvin, Ordwayne P.; – Plaintiff(s); Applying for Supervisory and/or Remedial Writs, Parish of Orleans, Civil District Court Div. H, Nos. 95-16491; to the Court of Appeal, Fourth Circuit, No. 2003-C-0327

September 26, 2003

Denied.

JTK

CDK

JPV

CDT

JLW

CALOGERO, C.J., would grant the writ.

JOHNSON, J., would grant the writ.

Supreme Court of Louisiana
September 26, 2003

/s/ Katherine A. Fontana
Deputy Clerk of Court
For the Court

APPENDIX C

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NO: 95-16491 **DIVISION "H"**
AD HOC SECTION

ODILON CHACHA COTO, ET AL

VERSUS J. RAY MCDERMOTT, ET AL

REASONS

There can be no doubt but that federal substantive maritime law applies to the validity of a seaman's release. It is equally well settled that state procedural law is applicable where it does not interfere with this substantive maritime law.

Even in federal court a Jones Act claimant is not absolutely entitled to a jury trial of his case. For example, his claims must yield to the judge's decision in the granting of summary judgment in favor of defendant and a directed verdict at the close of his case.

C.C.P. Article 927 provides that issues of releases are generally to be tried by the court in advance of trial through the Exception of Res Judicata. It remains within the trial court's discretion to refer the exceptions to the merits.

Being mindful of jury time, the confusion in the juror's minds that may result from a trial of the release simultaneously with a trial of the merits, and hoping (perhaps in vain) that a trial of the exception would not be as lengthy or expensive as a trial of the merits, I decline to refer this exception to the merits.

ORDER

The Exception of Res Judicata will be heard by the Court without a jury on February 10, 2003, at 10:00 A.M.

/s/ Gerald Federoff
JUDGE GERALD FEDOROFF

APPENDIX D

ODILON CHACHA COTO; EDIBERTO HERNANDEZ HERNANDEZ; EMEDELIO H. TORRES; HECTOR R. GAMAS; NELLI R. OBANDO, ET AL.	*	**NO. 99-CA-1866**
	*	**COURT OF APPEAL**
	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
VERSUS	*	
J. RAY MCDERMOTT, S.A.; MCDERMOTT INTERNATIONAL, INC.; THE AMERICAN BUREAU OF SHIPPING, INC.; CCC FABRIONES Y CONSTRUCCIONES, ET AL.	*	

* * *

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 95-16491, DIVISION "H-12"
HONORABLE MICHAEL G. BAGNERIS, JUDGE

* * *

JUDGE PRO TEMPORE PATRICK M. SCHOTT

* * *

(Court composed of Judge William H. Byrnes, III, Judge Patricia Rivet Murray, Judge James F. McKay III, Judge Michael E. Kirby, Judge Pro Tempore Patrick M. Schott)

MCKAY, J., DISSENTS WITH REASONS

MAURY A. HERMAN
BRIAN D. KATZ
DAVID K. FOX
HERMAN, HERMAN, KATZ & COTLAR, L.L.P.
New Orleans, Louisiana

-and-
SAMUEL R. PALERMO
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COUNSEL FOR DEFENDANTS/APPELLEES

REVERSED AND REMANDED

Plaintiffs have appealed from summary judgments dismissing their Jones Act and general maritime claims on the basis of releases executed by them in favor of defendants (hereinafter McDermott). The issue is whether the evidence of record shows that there is no genuine issue of material fact to support the conclusion that plaintiffs executed valid seaman's releases according to the standards set out in *Garrett v. Moore-McCormack Co.*, 317 U. S. 239, 63 S. Ct. 246, 87 L. Ed. 239 (1942).

Plaintiffs are eleven divers from a crew of twenty divers who were aboard a barge in Mexican waters on October 15, 1995, when it sank in a storm. They were rescued and sent home at the expense of their employer, McDermott. On October 27 McDermott held a meeting with plaintiffs to discuss settlement of their claims and hosted a banquet to celebrate plaintiffs' survival. On the next day ten of the divers including six of the plaintiffs met separately with McDermott's attorney and settled

their claims for $75,000 each. The remaining plaintiffs settled their claims between October 30 and January 30, 1996.

At the October 27 meeting, Don Terry, manager of McDermott's Diving Division made a lengthy presentation to the divers which was preserved on videotape. The subject was payment of compensation to the divers in settlement of any claims by those who had not sustained physical injury. Plaintiffs' version of that presentation is that it contained threats, misrepresentations, and promises of reward that coerced and misled them and left them ignorant of their rights. On the other hand, McDermott views the presentation as a fair, complete, even-handed, and objective outline of all the options available to plaintiffs with a complete and objective explanation of their rights. After the presentation, Terry had the divers meet privately to discuss their claims among themselves. They withdrew and selected a spokesman from their number. They concocted a settlement figure of $500,000 each which their spokesman relayed to Terry and which he rejected. In the meantime the divers learned from J. J. Riddle, another McDermott representative, that McDermott's deductible was $1.5 million. They surmised that McDermott would settle for this total amount among the twenty divers or $75,000 each. After further discussion between representatives of the divers and McDermott, the latter's advised that they would pay $75,000 to each diver interested in settlement. The spokesman reported that at least half of the divers would accept the settlement.

Later that evening McDermott hosted the survival celebration banquet for the dive crew. Following the banquet, the men continued to celebrate with drinking in Terry's hotel room and at French Quarter bars until the

early hours of October 28, 1995. Later that day six of the plaintiffs met separately with McDermott's attorney and settled their claims for $75,000 each. Each meeting was recorded on videotape. Defendants contend that the videotapes prove that plaintiffs had a complete understanding of what they were doing and that they intelligently and freely entered into the settlements. Plaintiffs contend the videotapes prove that they were unfairly led or forced into settlements they did not understand and that they needed their own lawyers to advise them. They also argue that their mental ability was impaired as a result of the all-night partying and drinking the night before, but McDermott argues that the videotapes disprove this argument.

In *Stalnaker v. McDermott Corp.*, 505 So. 2d 139 (La. App 4 Cir. 1987) this court reviewed a summary judgment that dismissed a seaman's suit on the basis of a release he had given to the defendant. The court recognized that the substantive law applicable to the validity of a seaman's release is from federal admiralty jurisprudence, but the procedural device of summary judgment is governed by Louisiana law. In *Garrett v. Moore-McCormack Co., supra,* the United States Supreme Court provided the following legal standard governing the validity and enforceability of an unrepresented seaman's release:

> The burden is upon one who sets up a seaman's release to show that it was executed freely, without deception or coercion, and that it was made by the seaman with full understanding of his rights. The adequacy of consideration and the nature of the medical and legal advice available to the seaman at the time of signing the release are relevant to an appraisal of this understanding.

In *Stalnaker, supra,* at 140, this court elaborated on pertinent federal maritime law as follows:

> It is well settled that releases are signed by seamen are given the most careful scrutiny. *Halliburton v. Ocean Drilling and Exploration,* 620 F.2d 444 (1980). The support for this principle can be found as early as 1823 wherein Justice Story, sitting on the Circuit, stated:
>
> > "They [seamen] are emphatically the wards of the admiralty; and though not technically incapable of entering into a valid contract, they are treated in the same manner as courts of equity accustomed to treat young heirs, dealing with their expectancies, wards with their guardians, and cestuis que trust with their trustees." *Harden v. Gordon,* 11 Fed Cas. At 485 (1Cir. 1823).
>
> Subsequent jurisprudence has termed the release of a seaman precarious, at best, and has clearly laid the burden on the party seeking to uphold the release to show that it was given with an informed understanding by the seaman and an appreciation of the consequences of the release. *Cates v. United States of America,* 451 F.2d 411 (5th Cir. 1971). A release is not valid unless it has been executed without deception or coercion. *Charpentier v. Fluor Ocean Services, Inc.,* 534 F.2d 71 (5th Cir. 1976). On a motion for summary judgment predicated on a seaman's release, the Federal jurisprudence has placed a heavy burden on the shipowner for he must conclusively demonstrate the absence of genuine issues of material fact. *Hallibruton, supra.*

A summary judgment is appropriate only when there is no genuine issue as to material fact. LSA-C. C. P. Art. 966 (B). In determining whether an issue is genuine, courts cannot consider the merits, make credibility determinations, evaluate testimony or weigh evidence. *Oakley v. Thebault,* 684 So. 2d 488, 4490 (La. 4 Cir. 1996). A summary judgment is rarely appropriate for a determination based on subjective facts such as intent, motive, malice, knowledge or good faith. *Penalber v. Blount,* 550 So. 2d 577, 583 (La. 1989).

Defendants rely heavily on the videotape of Don Terry's presentation to the divers at the October 27 meeting. As mentioned above each side of this lawsuit argues that the videotape supports its position. This very fact compels the conclusion that the use of the videotape necessarily includes a judgment that Terry was or was not credible, he was or was not being entirely objective, and that he was perceived by his listeners as fair and even-handed or threatening and coercive. These are all subjective reactions by his listeners which must be evaluated in determining what effect is to be given to the presentation. This is fact finding. It constitutes a weighing of evidence and an evaluation of credibility. It is clearly not the stuff out of which a summary judgment is to be made. The same is true of the videotapes made of the men when they were given the releases by McDermott's attorney. McDermott argues that these show that the men understood what they were doing. This is a question to be resolved by the trier of fact. The subjective state of the minds of these men is surely a genuine issue of fact. Indeed, a fair reading of the reasons for judgment by our esteemed brother below demonstrates that findings of fact were implicit in his reasons. For example, he stated, " . . . after reviewing the evidence, the Court is of the opinion that these individuals

were not improperly influenced or coerced by any of the events which preceded the signing of the Receipt and Releases, including any representations made to the divers by their supervisor, Don Terry." He also stated that the videotapes indicate that the documents were executed freely and with full understanding of the individuals' rights. Such observations are typical of a judge in the role of the trier of fact, but they do not support the application of a summary judgment.

An additional problem with McDermott's case is its failure to show that the consideration for the releases was adequate. In the Garrett case the court stated that this was "relevant" to an appraisal of the seaman's understanding of his rights. In this court McDermott argues that the amount paid to each plaintiff was in excess of his annual wage, and while that may be a factor to consider it is not the only one. The question is whether each plaintiff could make an intelligent evaluation of his claim as seen by a judge or jury after a trial and an intelligent estimate as to the length of time which would transpire before his case ripened into a final judgment and his chances for success in the case. These are some of the factors that bear upon the adequacy of any settlement. In any event this is a genuine issue of material fact which precludes summary judgment in this case.

Accordingly, the summary judgments rendered herein are reversed and set aside and the case is remanded to the trial court for further proceedings. All costs of this appeal are assessed against McDermott. The assessment of other costs shall await the outcome of the case.

REVERSED AND REMANDED.

McKAY, J., DISSENTS WITH REASONS.

I respectfully dissent from the majority's opinion and would affirm the trial court's grant of summary judgment.

Given the risks of litigation, a seaman's release may not be set aside where the amount of the settlement is not clearly inadequate, as the seaman must live with the benefit of his bargain. *Durden v. Exxon Corp.*, 803 F.2d 845 (5th Cir. 1986). While the adequacy of consideration is relevant, the primary concern is whether the seaman has received what the court believes to be an adequate consideration. *Stipelcovich v. Sand Dollar Marine, Inc.*, 805 F.2d 599, 606 (5th Cir. 1986), citing *Bass v. Phoenix Seadrill/78 Ltd.*, 749 F.2d 1154, 1161 (5th Cir. 1985).

In the instant case, each of the appellants met with McDermott's legal representatives and agreed to settle his claim against the appellees for $75,000.00 (the sum was $85,000.00 for Ordwayne Chauvin). The settlement amount was not an arbitrary figure proposed by McDermott but a figure sought by the plaintiffs after McDermott refused their initial demand. The sum of $75,000 was also greater than the annual net income of any of the plaintiffs. This figure does not appear to be clearly inadequate.

Furthermore, the meetings were video taped. The video tapes show the attorneys for McDermott providing each seaman with a thorough and detailed explanation of his legal rights including a discussion of the physical and emotional condition of each, his right to recover damages for physical and emotional injuries, and his release of claims for all injuries including those that might arise later. The plaintiffs were also told they were under no pressure to settle their claims; several members of the dive crew did in fact return to work before settling their

claims. The plaintiffs were all experienced commercial divers and many of them had served in the military. They ranged in age from twenty-six to forty-nine. A number of them had even attended some college. Considering these factors, it appears that the members of the dive crew had an informed understanding of what they were doing.

I believe that the defendants' summary judgment evidence satisfied the burden of establishing that each seaman freely and voluntarily executed his release with a full understanding of his rights as well as the consequences of the releases. Accordingly, I would affirm the trial court's granting of summary judgment.